Supreme Court, U.S.
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(5)

No. 91-962

IN THE

Supreme Court Of The United States

October Term, 1991

CYNTHIA HARRIS,

Appellant,

v.

THE CITY OF BIRMINGHAM, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MEMORANDUM REGARDING THE STATUS OF REQUEST FOR PRECLEARANCE

JAMES K. BAKER
Counsel of Record
Attorney for the City
of Birmingham
800 AmSouth-Sonat Tower
Birmingham, Alabama 35203
(205) 251-1000

MEMORANDUM REGARDING THE STATUS OF REQUEST FOR PRECLEARANCE

This appeal is from the decision of a three-judge court pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c). The question presented by this appeal is whether the City was required by the Voting Rights Act to seek preclearance of (1) legislation providing for a referendum on greyhound racing and parimutuel wagering thereon (Act 91-187) and (2) the setting of a referendum held pursuant to that legislation. By letter dated February 13, 1992, the City submitted to the Justice Department, Civil Rights Division, Voting Rights Section (the "Voting Rights Section" or "Section") a request for preclearance of the subject legislation and of a June 2, 1992, setting of a referendum under that legislation. In light of that submission, the City filed with this Court a Suggestion of Mootness. By letter dated February 27, 1992, the Clerk of Court, over the signature of Francis J. Lorsen, Chief Deputy Clerk, instructed the City to apprise the Court as to the status of the preclearance request and directed that a status memorandum be submitted on or before May 13, 1992. This pleading is submitted in accordance with that directive.

By letter dated April 14, 1992, the Voting Rights Section notified the City that, excepting one provision, the Attorney General does not interpose any objection to Act 91-187, specifying the procedures for conducting a referendum to authorize greyhound racing and parimutuel wagering thereon in the City of Birmingham. The letter further states that the Attorney General also does not interpose any objection to the selection of the August 27, 1991, and June 2, 1992, referendum dates. The April 14 letter is reproduced in its entirety as Appendix A, hereto.

The Voting Rights Section did not preclear a provision providing that the referendum not be held in conjunction with a Birmingham City election for Mayor of for two or more council members. With respect to that provision, the Section concluded that it did not have sufficient information upon which to make a determination. Consequently, the Section requested a substantial amount of information it considers necessary to complete its analysis of the remaining provision.

As noted, the provision remaining under consideration forbids the holding of a referendum in conjunction with a mayoral or councilmanic election. No such elections will occur in 1992; council member elections will next occur in 1993, the next mayoral election will occur in 1995. Hence, the only provision yet to be precleared is of no consequence to the June 2, 1992, referendum (which has itself already been precleared). If the June 2 referendum passes, no further elections can ever be had under Act No. 91-187. As a result, the subject provision may never be applied. Given that possibility and the substantial time and expense involved in responding to the Section's request, by letter dated May 4, 1992, the City indicated to the Section its intent to await the outcome of the June 2 referendum before providing the requested information. The City's May 4, 1992, letter to the Voting Rights Section is reproduced in its entirety as Appendix B, hereto.[1] As the May 4 letter to the Voting Rights Section indicates, the City believes that preclearance of the outstanding provision will be unnecessary if the June 2

[1]The penultimate paragraph of the May 4 letter erroneously states that the provision in question could not be given effect until 1995. As noted above, 1995 is the date of the next mayoral election; councilmanic elections will occur in 1993. The City has, by letter dated May 8, corrected its misstatement.

referendum passes; the City will provide the requested information and pursue preclearance of the outstanding provision should the June 2 referendum fail.

The foregoing, together with the appended correspondence, provides a complete and accurate description of the preclearance proceedings to date.

Respectfully submitted

JAMES K. BAKER
Counsel of Record
Attorney for the City
of Birmingham
800 AmSouth-Sonat Tower
Birmingham, Alabama 35203
(205) 251-1000

APPENDIX A

U.S. Department of Justice
Civil Rights Division

JRD:MAP:DJH:maj
DJ 166-012-3
92-0591

Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

April 14, 1992

James K. Baker, Esq.
C/O Haskell, Slaughter, Young & Johnston
800 AmSouth-Sonat Tower
1900 Fifth Avenue North
Birmingham, Alabama 35203

Dear Mr. Baker:

This refers to the following matters submitted to the Attorney General for review under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, by the City of Birmingham in Jefferson County, Alabama:

1. Act 84-131, which specifies the procedures for conducting a referendum to authorize horse racing in the City of Birmingham;

2. Act 91-187, which specifies the procedures for conducting a referendum to authorize horse racing or greyhound racing in the City of Birmingham where neither previously has been authorized;

3. Act 91-187, which specifies the procedures for conducting a referendum to authorize greyhound racing and pari-mutuel wagering thereon (in addition to the previously authorized horse racing and pari-mutuel wagering thereon) in the City of Birmingham, including:

a. the provision that the measure must be approved both by the electorate of Jefferson County and the electorate of the City of Birmingham located in Jefferson County,

b. the provision that the initial referendum election was to be held prior to January 1, 1992,

c. the provision that any referendum be conducted between 45 and 90 days after the adoption by the City of Birmingham of an ordinance or resolution setting the date of the election,

d. the provision that the referendum may not be held in conjunction with a Birmingham city election for mayor or for two or more councilmembers, and

e. the provision allowing the holding of successive elections on the issue if the issue is defeated in a prior election, with the limitation that not more than one election may be conducted each year;

4. The selection of August 27, 1991, as the date for conducting the initial referendum election on greyhound racing; and

5. The selection of June 2, 1992, as the date for conducting a second referendum on greyhound racing.

With respect to the matter specified in item 1, your April 2, 1992, letter withdraws this from Section 5 review. In addition, with respect to the matter specified in item 2, we understand that this effects no change with respect to the City of Birmingham since horse racing previously has been authorized in the city, and does not apply to any other Alabama jurisdiction. Accordingly, the Attorney General will make no determination concerning these matters. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25 and 51.35).

With respect to the matters specified in item 3, the Attorney General does not interpose any objection except for the provision specified in item 3(d). The Attorney General also does not interpose any objection to the selection of August 27, 1991, and June 2, 1992, referendum dates. However, we note that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See 28 C.F.R. 51.41 and 51.43.

The precleared referendum procedures are viewed as enabling legislation. Therefore, any changes affecting voting

which may be subsequently adopted pursuant to those procedures will be subject to Section 5 review (*e.g.*, the selection of another referendum date if the proposition fails on June 2, 1992). 28 C.F.R. 51.15.

With respect to the provision specified in item 3(d) prohibiting the holding of the greyhound racing referendum in conjunction with certain municipal elections, our analysis indicates that the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. A detailed explanation of the reasons for the adoption of this provision.

2. A detailed, chronological description of the events, meetings, and discussions leading to adoption of this provision. Include a description of all discussions involving any City of Birmingham or Jefferson County elected official, any city or county staff person acting on behalf of an elected official, or any member of the state legislature regarding the merits or demerits of the provision, or any alternative provision, including discussions other than at formal meetings.

3. Copies of all documents relating to the provision, including minutes, transcripts, and tape recordings of all relevant municipal, county, and state legislative meetings and hearings; correspondence sent by or addressed to any persons identified in the previous paragraph; and all newspaper articles, editorials, letters to the editor, and other publicity concerning the provision.

4. A listing of all citywide or countywide special elections (not conducted in conjunction with a regularly scheduled election) in Birmingham or Jefferson County from 1980 to the present. For each such election (including the August 27, 1991, greyhound racing referendum), include the election returns, by precinct; describe the issue or contest on the ballot; and provide any information or estimate of the black registra-

tion percentage or black voting age population percentage in each precinct at the time of the election. Also provide the same information for regular Birmingham municipal elections from 1985 to the present.

5. A listing of any other state legislation providing for a local referendum, adopted since 1970, which contains a provision precluding the holding of the referendum in conjunction with any regularly scheduled election or a certain category of regularly scheduled elections.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. 28 C.F.R. 51.37. However, if no response is received within sixty days of this request, the Attorney General may object to the proposed change consistent with the burden of proof placed upon the submitting authority. See also 28 C.F.R. 51.40 and 51.52(a) and (c). Changes in procedures which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. Therefore, please inform us of the action the City of Birmingham plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, please call Mark A. Posner, an attorney in the Voting Section, at 202-307-1388. Refer to File No. 92-0591 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By: /s/ Steven H. Rosenbaum
Steven H. Rosenbaum
Chief, Voting Section

APPENDIX B

JAMES K. BAKER
800 AmSouth-Sonat Tower
Birmingham, Alabama 35203
(205) 251-1000

May 4, 1992

Mr. Mark A. Posner
Civil Rights Division
Voting Rights Section
Post Office Box 66128
320 1st Street, N.W.
Washington, D.C. 20035-6128

Re: City of Birmingham, Greyhound Referendum,
File No. 92-0591

Dear Mr. Posner:

By letter dated April 14, 1992, the Voting Rights Section responded to our request for preclearance with regard to the above-referenced matter. The City of Birmingham and all involved in preparing for the upcoming June 2 election appreciate the cooperation of the Section and the timely and thoughtful attention which was given to the City's preclearance request.

As you know, the Section precleared the August 27, 1991, referendum, the upcoming June 2, 1992, referendum, and all but one provision of Act No. 91-187 (specifying the procedures for conducting a referendum to authorize greyhound racing and parimutuel wagering thereon in the City of Birmingham, Alabama). With respect to one provision — that a referendum may not be held in conjunction with a mayoral or council-manic election — the Section concluded that the information available was insufficient to enable it to reach a final determination under Section 5, and accordingly, the Section requested further information from the City. Please accept this letter as the requested response from the City of Birmingham.

The City has no objection to providing the Voting Rights Section with such of the requested information as the City can gather. However, collection of the information and documents requested represents a very substantial undertaking. For example, a response to request No. 5 (listing of other State legislation providing for local referendum and which precludes certain election dates) requires manual review of every piece of local legislation passed since 1970; such local acts of the Legislature are not codified and there is no index therefor. It is self-evident that extensive effort will be required to locate and assemble the other information and documents requested by the Section.

As a result, it is the City's desire to undertake the substantial time and expense involved in gathering the requested information only if some purpose will be served by doing so. In that regard, the City notes that if the June 2 referendum passes, no further elections can be held under Act No. 91-187. The remaining provision, which does not come into play in any respect with regard to the June 2 referendum, can never have any future application should the June 2 referendum pass. Preclearance of the outstanding provision would, therefore, be moot.

Given the possibility that the provision remaining under consideration will be mooted by the results of the June 2 referendum, and given the substantial time and expense involved in collecting the information requested by the Section, the City believes it is appropriate to await the results of the June 2 referendum before undertaking the extraordinary burden of responding to the inquiry set forth in the Section's April 14 letter. Should the referendum pass, the City believes that preclearance of the remaining provision of Act No. 91-187 will be moot.

Consequently, the City plans to respond to the Section's inquiry should the June 2 referendum fail, even though the provision remaining under study could not be given effect until 1995. Meanwhile, the City perceives no benefit — to itself, to the Voting Rights Section, or the purposes of the Act

— in diverting the resources of the City and the Section to a matter that may shortly become moot.

If you have any questions or observations, please contact me or Richard Walston at the phone numbers and addresses already contained in your file. If you believe the City's position is in any way inappropriate, please let or Richard Walston know that as well.

Very truly yours,

/s/ James K. Baker

James K. Baker
Counsel for the City
of Birmingham

JCK/dlb/W62394.1

bcc: Mr. Milton McGregor
Mr. Fred Gray
Mr. William M. Slaughter
Mr. James C. Huckaby, Jr.
Mr. James K. Baker
Mr. Robert D. Shattuck, Jr.